United States Court of Appeals

for the Second Circuit

APPENDIX

75-7262

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA,

Plaintiff-Appellant

- against -

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FILED
AUG 14 1975

Appeal from the United States District Court for the Eastern District of New York

APPENDIX FOR PLAINTIFF-APPELLANT

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TRANSCRIPT OF PROCEEDINGS BEFORE JUDD, D.J., ON NOVEMBER 13, 1973

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X'

MEHRA,

Plaintiff,

- against - 72 C 787

LISCZA,

Defendant.

----------X

United States Courthouse
Brooklyn, New York

November 13, 1973
10:00 A.M.

B e fo r e:

HON. ORRIN G. JUDD, U. S. D. J.

(Excerpt)

FRANCES S. KARR
OFFICIAL COURT REPORTER

A P P E A R A N C E S :

ALVIN FEDER, ESQ.
Attorney for plaintiff

MESSRS. BOWER & GARDNER
Attorneys for defendant
415 Madison Avenue
New York, New York 10017

BY: HUGH. F. MC SHANE, ESQ.

(Excerpt)

MR. FEDER: Plaintiff rests your Honor.

MR. McSHANE: May I make my motions in the absence of the jury your Honor?

THE COURT: The jury will be excused for a few moments. Please go back to the jury room and do not talk about the case.

MR. McSHANE: For the record your Honor, may we stipulate at this time to change the title of the action as it concerns defendant Roberta Liscza to read Roberta Bentz, the defendant, the defendant having married the other co-defendant since the date of the institution of this action. I assume there is no objection.

MR. FEDER: No objection.

MR. McSHANE: On behalf of Roberta Bentz and Rudolph J. Bentz Jr., I respectfully move for a dismissal of the plaintiff's complaint under Rule 41(b) of the Federal Rules of Civil Procedure upon the facts and the law that the plaintiff has shown no right of relief.

The plaintiff as administrator of the

goods and chattels and credits of the deceased by his own testimony has not indicated that the deceased was supporting him or his wife, Mrs. Mehra, mother of the decedant at the time the accident occurred herein.

I respectfully submit to your Honor as proposed in our brief the relevant pertinent Pennsylvania statute, particularly Section 1602, persons entitled to maintain an action for injuries causing death are limited to the husband's widow, children, parents of the deceased and no other relatives. The only testimony we have in this case that is relevant concerning support at the time and there is even a question about that, at the time of the decedant's death was that he was allegedly supporting a sister and a grandmother.

THE COURT: That creates a fair inference he would support his father when his father got old.

MR. McSHANE: I am sorry.

THE COURT: That creates a fair inference he would support his father if needed when his father got old.

MR. McSHANE: I do not see we have any evidence in this case upon which to base that, your Honor. And again, not knowing the vagueries of life we do not know whether the father would have outlived this young man in this case or not. We have no evidence on that nor do we have any evidence of the life expectancy.

THE COURT: We have life norm lcy tables which would indicate that.

MR. McSHANE: In any event, there was no support given for a number of years to the father or mother by the administrator's own testimony and there is no reason to suppose there would be a change in this posture after the father retired.

THE COURT: Motion denied.

MR. McSHANE: Respectfully except.

May I also move to dismiss the complaint against the defendant Roberta and Rudolph Bentz on the basis the plaintiff has failed to make out a prima facie case of negligence against either or both.

THE COURT: Going down a straight road they hit a man without seeing him. They must

have been smooching.

MR. McSHANE: I respectfully except your Honor, there is no evidence in the case on that.

THE COURT: There is evidence that they say they did not see him and they hit him.

MR. McSHANE: There is no evidence in the case to demonstrate where the plaintiff decedant came from.

THE COURT: He was at their left front fender and they did not blow a horn and they did not turn.

MR. McSHANE: At the time of the impact we do not know where he came from on the roadway.

THE COURT: Motion denied.

MR. McSHANE: May I be heard on it?

THE COURT: In the Court of Appeals. What more is there to argue here.

MR. McSHANE: Well, the fact there is no evidence in the case as to where the plaintiff, the decedant, was prior to the time of the accident.

THE COURT: He was in Allentown.

MR. McSHANE: I am talking about on the

roadway, walking, crawling or lying there.

THE COURT: It makes no difference, they should have seen him.

MR. McSHANE: We have had some testimony -- in fact it was read into the evidence on the deposition of the defendant -- may I have the Court's indulgence for a moment. There was the testimony and I will find it if I can have the Court's indulgence concerning the fact the other people who came on the scene of the accident that ran back up hill. If this accident occurred on a hill or at the crest of a hill or an apex of a hill obviously headlights are going to go straight up if a car is coming up a hill and would not show --

THE COURT: Then he should not have been going at 55 miles an hour.

MR. McSHANE: Your Honor, the speed limit there was 60 as I recall.

THE COURT: That is the limit, that does not mean you have to be going 60 when you cannot see.

MR. McSHANE: No it doesn't, if he is in control of his vehicle.

THE COURT: He was not in control, he hit

somebody that he did not see.

MR. McSHANE: The question is here whether the plaintiff has met his burden of proof.

THE COURT: I deny your motion.

MR. McSHANE: Respectfully except.

* * * *

TRANSCRIPT OF PROCEEDINGS BEFORE JUDD, D.J., ON NOVEMBER 14, 1973

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X

MEHRA,

Plaintiff,

- against - 72 C 787

LISZCA,

Defendant.

----------X

United States Courthouse
Brooklyn, New York

November 14, 1973
10:00 A.M.

B e f o r e :

HON. ORRIN G. JUDD, U. S. D. J.

(Excerpt)

ILENE GINSBERG
OFFICIAL COURT REPORTER

A P P E A R A N C E S :

ALVIN FEDER, ESQ.
Attorney for plaintiff

MESSRS. BOWER & GARDNER
Attorneys for defendant
415 Madison Avenue
New York, N.Y. 10017

BY: HUGH F. MC SHANE, ESQ.

(E X C E R P T)

* * * *

THE COURT: I'm going to give counsel ten or fifteen minutes if you want to look at the requests to charge and then I will talk with you in chambers.

MR. McSHANE: I have some motions to make.

At this time the defendants rest and at this time I move to dismiss the entire cause of action for conscious pain and suffering brought by the administrator on the basis that there is no proof of conscious pain and suffering of the decedant.

THE COURT: How about it, Mr. Feder?

MR. FEDER: The only fair response to that is that I think there was a mr sel of evidence from Doctor Halpern -- something to the effect that there probably was no conscious pain or suffering but I don't think he conclusively eliminated the possibility. I am not a hundred percent satisfied that should be excluded from the case.

THE COURT: I think it is a question

for the jury. If a person bleeds to death I don't think the jury has to say that he necessarily died instantly, especially when the pronouncement of death didn't come until an hour or so later.

MR. McSHANE: I think it is highly speculative as t o his conscious pain and suffering. There is not a shred of evidence that the deceased was at any time conscious following the accident.

THE COURT: He is dead so he can't tell us and the rule is you don't need as much proof in a death case.

MR. McSHANE: Exception.

I'd like to renew the motion I made previously at the end of plaintiff's case to dismiss for failure to make out a case of actionable negligence against either or both defendants and also Rule 41(b) upon the fact at law that the plaintiff has shown no right of relief in this case.

THE COURT: Is there any dispute that the rule of last clear chance applies in Pennsylvania?

MR. McSHANE: I am not aware that it does. I would dispute it at this point.

THE COURT: I deny the motion with leave to renew with showing about Pennsylvania law. Otherwise, I assume the rule is the same in New York and in Pennsylvania.

MR. McSHANE: In other words, if I demonstrate there is no last clear chance rule you would renew the motion?

THE COURT: Yes.

MR. McSHANE: I submit that your Honor's questions to Mr. Bentz when discussing the fact that he reacted bodily to seeing this image and he said he went backward or that was the thrust of what he said, and your Honor asked the question "Where do you have to go to put your foot on the brake" indicating he would have to go forward, I think that was highly prejudicial and I would ask for the withdrawal of a juror and ask for a mistrial.

THE COURT: It seems to me odd that you have to go back to put your foot on the brake. I wanted to find out what is wrong with the Volkswagon. Apparently, they don't

use safety glass which has nothing to do with this, of course.

MR. McSHANE: I think it is a fair inference that somebody suddenly seeing something would go backward. Maybe he was thinking of going to the brake but he had glass over him. I think the question was prejudicial and I ask for a declaration of a mistrial.

THE COURT: Denied.

MR. McSHANE: Exception.

MR. FEDER: I would ask your Honor to instruct the jury that the evidence that was allowed to go into evidence or, the proof going into evidence, over my objection, with respect to the father's collecting one hundred and ten thousand dollars in life insurance should have been removed and not gone into evidence.

I think that can certannly effect the outcome of the case.

THE COURT: I think it may but I am somewhat persuaded by Mr. McShane's argument that the financial loss is measured by the probability of being helped.

I am not sure whether you are right.

MR. McSHANE: May I say for the record, your Honor, the thrust of my argument was that counsel for the plaintiff opened the door to bringing in this question of insurance recovery and double indemnity by asking questions of the administrator about his expectation when he retires and he gets a lump sum settlement indicating he would become wholly dependent on the son if the son were required to support him and I think that opened the door to proper introduction.

THE COURT: It is a tight question because if the son had not died he wouldn't have had the insurance.

MR. McSHANE: I agree with that. He would still carry it, I'm sure.

THE COURT: It may be like the medical insurance that is paid for you by you or somebody else and doesn't enter the picture --

MR. McSHANE: I would say medical insurance is a collateral source.

THE COURT: I have assumed there is a difference between life and medical insurance and I am going to stick to that unless you give

me some cases in the morning.

MR. FEDER: I have given you three cases and two of them address themselves to life insurance and the third one spells out the philosophy and I ask your Honor to read them because I don't think there is authority to the contrary and the argument Mr. McShane makes with regard to opening the door implies that I went off to a collateral tangent and if there is anything I have an obligation to do, it is to show the damages my client sustained and wherein the father survives the son, it is to show the father has intent toretire and the child's earnings may be used to support the father.

So, to say because I gave that primary and essential proof for my case, I have therefore allowed Mr. McShane to introduce evidence that the father profited from thedeath and received one hundred and ten thousand dollars from a life insurance policy -- on the one hand I am doing a proper job for my client and then I am told by Mr. McShane because I did that he is now allowed to bring in certain evidence

which clearly, the jury is going to say, this man profited by one hundred and ten thousand dollars from the death -- what does he want?

Whether there is money to give him, money now or later -- in applying the Court's guidelines in the case the jury is bound to say, "The man got a hundred and ten thousand dollars. What more do they want in this courtroom?"

To that extent I think the evidence in their minds is not only to the question of damages but as to a determination as to whether I win or lose.

THE COURT: I think it is not a matter of opening a door but a matter of whether it has a proper bearing on the need for support.

MR. McSHANE: I was about to make that point.

In my view, the decedant had no duty or obligation to support his parents.

THE COURT: That has nothing to do with whether they suffer from his death.

MR. McSHANE: Pecuniary loss -- I think so.

THE COURT: He didn't have to leave his estate to them. He could have willed it to Carnegie Institute but they have a right to be compensated for their expectations to inheritance.

MR. McSHANE: I am talking about right of support in the future which they expected from the decedant here.

The door opened in my view when Mr. Feder went into that area at great length over my objection and I think that permits me, in fairness to both sides, to indicate if he was expecting "X" number of dollars in support from his son when he reached 60 and got the lump sum settlement and was expecting monies to live on because he had only the three thousand dollar lump sum settlement.

I can show mitigation of damages by bringing in the insurance.

THE COURT: You are saying that Mr. Bentz should be excused from paying anything to Mr. Mehra because his employer paid him some money. That's the collateral source rule.

MR. McSHANE: Not at all.

THE COURT: Well, isn't it a fair interpretation of what you are arguing?

MR. McSHANE: I am stunned to hear that.

THE COURT: The question is how much Mr. Mehra owes them -- How much Mr. Bentz owes them if he killed the man.

MR. McSHANE: Negligently and without contributory negligence on the part of the decedant. That's the jury question. I wouldn't deign to begin to guess. I wouldn't dare guess what he owes them.

THE COURT: Should it be reduced by the fact he carried life insurance?

MR. McSHANE: Yes, because I think counsel opened the door. But, I have yet to see any case in point that denies it in this set of circumstances.

THE COURT: I will deny the motion for now and reconsider it overnight.

MR. FEDER: Two comments with respect to that.

To accept Mr. McShane's logic the jury would have to return a verdict in excess of

one hundred and ten thousand dollars --

THE COURT: They have kids in school, grandchildren, I believe.

MR. FEDER: The jury would have to make a calculation to give them more and then subtract it to arrive at the difference between "X" and "Y" -- that's point one -- which would make the job a Herculean task, to get that verdict from the jury. I don't anticipate that kind of verdict.

The net result of allowing the jury to consider that Mr. Mehra profited or received one hundred and ten thousand dollars would be to give the benefit to the tort feasor for the foresight of taking out insurance -- or having worked and having it taken out as part of his salary and there is no reason for the tort feasor to derive the benefit of these circumstances because he caused the death of someone and the fact of insurance inures to his benefit.

* * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE PLATT, D.J., ON FEBRUARY 20, 24 and 26, 1975

* * *

"Q What time did you leave?

"A Approximately 20, 15 minutes before eleven.

"Q Between the time you got there and the time you left, did you have anything to drink?

"A Yes. I had two scotches" I'm sorry - "I had two scotch and sodas before supper.

"Q What size glass.

"A The normal cocktail, an inch and a half deep - whatever.

"Q Did you have any other alcoholic beverages?

"A I had a beer during dinner."

I'm going to turn the page to page 28, the first question at the top:

"Q When you came on to 309, you were going north?

"A Yes.

"Q Would you please describe the road conditions to me?

"A The road was clear and the vision was clear and the road surface was normal.

"Q How about the windows of the car?

"A Clean.

"Q The windshield wipers weren't going?

"A No, no need for them.

"Q Was the radio on?

"A No.

"Q Where did you get on Route 309 as you were heading back towards the colliding area?

"A Approximately 200 feet south of the intersection of 309 and 181 - "

THE COURT: 191.

MR. FEDER: 191, I mean.

"Q How far did you travel between the time you got on 309 and the time of the impact?

"A It was approximately four or five miles.

"Q How many lanes of traffic are there going north?

"A On the way from where I got on, to the impact, it was two.

"Q How many lanes going south?

"A The same, two.

"Q Any divider or anything between them?

"A There is a medial strip, yes."

Skipping down to six lines from the bottom:

"Q How often during the past or let's say a year prior to the accident, had you travelled on 309?

"A I have no idea. Prior to the accident? I have no idea.

"Q Could it be more than a dozen times?

"A Could be."

Now, turning to page 30, about 6 lines down:

"Q In which lane of traffic were you travelling?

"A In the right.

"Q At any time before the time you got on 309 and the time of the impact, were you on any other lane other than the right lane?

"A No."

Now turning to the last question on the page:

"Q -

MR. CAPLAN: I'm sorry. You're skipping the next part.

MR. FEDER: Yes.

"Q What was the next speed you reached on 309 between the time you got on and the time of the impact?

"A Maximum?

"Q Yes.

"A Fifty-five.

"Q Pardon?

"A Fifty-five."

Skipping the next question:

"Q Is the Volkswagon an automatic shift or stick shift?

"A Stick.

"Q In what gear was the car in at the time of the impact?

"A Fourth.

"Q Is this the driving gear?

"A For that kind of driving, yes."

The last question on the page:

"Q Will you describe the events of that evening from the time you approached the Cedar Crest exition 309 until you brought the car to a stop?

"A From the time we approached the Cedar Crest exit until we stopped?

"Q Yes.

"A Well, we were goin, home and driving on 309 north. On the right lane going up, approaching the Cedar Cresit exit, we passed that exit. Not too long after that particular incident I experienced some kind of impact on the car. Glass shattered in my face and I proceeded to pull the car over to the side of the road and stopped, generally speaking.

"Q Now, did you hear anything before the glass shattered?

"A Well, there was like a thud and that was about it.

"Q Did you see what caused the glass to shatter?

"A No. I didn't.

"Q After the glass shattered and before you brought the car to a stop, did you know or had you come in contact with the glass?

"A No.

"Q You didn't see anything flying by?

"A Nothing I could pinpoint.

"Q Did you learn that evening what object you had hit?

"A That evening, I did.

"Q How did you learn that?

"A After we had stopped, the car stopped with my waving and a group of people from the car came out and two of which ran up the hill.

"Q You didn't go back with them?

"A No.

"Q When they came back, what did they say?

"A They said, 'We think you hit a hitchhiker'.

"Q Do you know if the man was a hitchhiker or not?

"A I had no idea it was a man in the first place.

"Q You didn't know it was a man?

"A No.

"Q All right. For the time that followed, where was your car situated with respect to the right lane, the left lane and the left shoulder?"

MR. CAPLAN: "Soft shoulder".

MR. FEDER: Excuse me. Soft shoulder.

"Q ...where was your car situated with respect to the right lane and soft shoulder?

"A It was in the right lane."

Turn to page 35, five lines down.

"Q Mr. Bentz, at the time of the thud, at the time the thud occurred - " I'm sorry.

"Q At the time the thud occurred, were you engaged in conversation with your now wife?

"A In that instant, I can't recall.

"Q You can't recall? Do you recall whether you were talking prior to the thud?

"A Sporadic."

Skipping five lines from the bottom:

"Q Mr. Bentz, were you looking at the time?"

MR. CAPLAN: No. You read it wrong.

MR. FEDER: I'm sorry. Right.

"Q Mr. Bentz, where were you looking at the time you heard the thud?

"A Where was I looking at the time?

"Q Yes.

"A Out the window, the front window.

"Q Which window?

"A The front windshield.

"Q In which direction were you looking?

"A Forward.

"Q Was there any obstruction that prevented you from seeing ahead for a second immediately before the impact?

"A No.

"Q How about for a period of three seconds before the impact?

"A No.

"Q Do you recall whether it was cloudy - ?

MR. CAPLAN: We stated it was a clear night. That's four lines from the bottom.

"Q Were your headlights on?

"A Yes. They were.

"Q Do you know how far the people went ahead of the car?

"A I would approximate 150, 100, 150 feet.

"Q Which part of the front glass broke? Was it on the left side or the right side?

"A It was on my side."

Skipping to the middle of the page:

"Q At any time, after the impact, other than the glass window, did you notice any other markings or damage to your wife's car?

"A I noticed that the liggle fog light, I should imagine it is called, on the left, front fender was broken.

"Q The left front fender?

"A Right."

Page 38, four lines down:

"Q Am I correct that prior to the time you heard the thud you didn't see anything in front of you?

"THE WITNESS: Correct."- --

MR. CAPLAN: Wait a second. He's reading wrong.

MR. FEDER: I'm sorry. "The reporter read the following". I'm going to go to four lines from the bottom, Mr. Caplan.

MR. CAPLAN: May I just ask you? You're skipping an awful lot. Will you go slow?

MR. FEDER: Absolutely.

MR. CAPLAN: You're going to the bottom?

MR. FEDER: Correct.

MR. CAPLAN: Go ahead.

"Q How much did you travel before you came to a stop?

"A Approximately 400, 500 feet.

"Q Do you know how much time it took between the time you heard the thud and the glass broke and the time that you came to a stop?

"A No.

"Q What did you do, physically, between the time that you heard the thud and the glass broke and the car came to a stop?

"A Well, I had to first - well, my hands grabbed the wheel extremely tight to hold the car tight and control it because the thud was a shock, the glass was flying into my face so I had to like to avoid the chips because a suddent blast of wind was blowing the glass towards me as well as something struck me on the side of the head (indicating).

"Q When you say 'my side of the head' over here, am I correct saying you've pointed to the left side of your head?

"A Yes and I proceeded to pull the car over.

"Q And in applying the brakes, did you apply hard pressure or did you bring your car to a stop slowly?

"A I was stopping slowly. I was in the process of reacting to braking and

shock and trying to do everything at one time. It was a slow process, rather than a screeching halt.

"Q As you were travelling north on 309, from the time you got on to the time of impact, was there any car in front of you?

"A Yes. Way ahead."

Now, on page 41, in the middle of the page, beginning with the question: Was there -

MR. CAPLAN: Do you want to give me a chance to find it, please?

MR. FEDER: Yes.

MR. CAPLAN: You say smack in the middle of the page?

MR. FEDER: Was there - the first two.

MR. CAPLAN: Go ahead.

"Q Was there any car coming in the northbound lane on 309 from the time you passed the Cedarcrest exit to the time of impact?

"A That would be the lane approaching

me?

"Q Yes.

"A No.

"Q There was none?

"A I was aware of none.

"Q Do you recall whether you were blinded by any lights?

"A No.

"Q Was there any car either to the left or to the right of you between the time you passed the Cedarcrest Boulevard Exit until the time of impace?

"A No.

"Q Was the highway congested northbound from the time you got onto 309 until the time of the impact?

"A No. Traffic was light.

"Q So you don't recall seeing any car in front of you, aside of you or one coming from the other direction?

"A Correct.

"Q Do you know how far beyond the Cedarcrest Exit that the impact occurred?

* * *

* * *

"A An infinitesimal amount of time -

"Q A split second?

"A Split second.

"Q You couldn't identify it at the time you saw it?

"A Right.

"Q Am I correct?

"A I couldn't identify it."

MR. CAPLAN: That's all. Thank you.

MR. FEDER: May I proceed, your Honor?

THE COURT: Yes.

ROSHAN L. MEHRA, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. FEDER:

Q Are you the father of Rajinder K. Mehra?

A Yes, sir.

Q Could you be kind enough, Mr. Mehra, to tell us in April, 1972, before the incident we're concerned with occurred, what did your family consist of?

A My family consisted of my mother, my wife and my four children, two boys and two girls.

Q Was Rajinder among these four children?

A He was the oldest child of the family.

Q In April of '72, how old was he?

A He was 32 years old.

Q How old are you now?

A I'm 59 years, five months and 11 days.

Q How old is Mrs. Mehra?

A She's 53 years old.

Q Now, you referred to a grandmother. Is that your mother?

A My mother.

Q How old is your mother?

A She is, at present, 79 years old.

Q Now, there came a time, did there not, where - withdrawn.

Where was she born?

A It was at Lahura.

Q Did there come a time, Mr. Mehra, when you took your family and moved to India?

A It was during 1947, the partition of the country.

Q And from 1947 to the time Raj' came to the United States, did Raj' live with you, your wife and your mother?

A Yes, sir.

Q When did Raj' come to the United States?

A He came in September, 1960.

Q Had any other members of your immediate family come to the united States before Raj' came in 1960?

A No, sir.

Q Did Raj come along with anyone at that time?

A He came alone.

Q How old was Raj' at that particular time?

A He was 21 years old.

Q Do you know where he lived when he came to the United States?

A He went to Seneca University of New York, Syracuse University of New York.

Q Was he a student or was he working there?

A He was a graduate, assistant doctor, doing his masters in mathematics.

Q Do you know if that involved working as well?

A Part time teaching and a student.

Q Did he have some income?

A Yes, sir.

Q Did there come a time when Raj' finished

his studies at Syracuse and went somewhere else?

A Yes. He moved from Syracuse and finally went to Fordham University, New York, to do his masters in mathematics.

MR. FEDER: With the Court's permission, rather than doing this in question and answer form, I propose to read, at this point, the identical background of Rajinder Mehra from Plaintiff's Exhibit 3.

THE COURT: I take it we settled that point?

MR. CAPLAN: Yes.

THE COURT: You may.

MR. FEDER: From 1956 to 1958, Mr. Mehra was in attendance at St. Johns College in India studying physics and chemistry.

From 1958 to 1959, he attended DeHradunn, in a town in India and received a Bachelor of Science in Mathematics and Statistics.

From July of '59 to May of 1960, he studied at Lucknow University, India, where he received a Master of Science I degree in Mathematical Statistics.

From September, 1960 to June of 1962, he

studied in Syracuse University, in Syracuse, and received 30 graduate credits in mathematics.

From June to July of '62, he studied at the University of Oklahoma and received 9 graduates in mathematics.

In the year 1963, he studied at the Electronics Computer Programming Institute in New York for 120 hours on programming the IBM 1401.

From June of '64 to July of '63, he studied at Fordham University and received a Master of Arts degree in Mathematics.

Q Now, did other members of your family come to the United States? Is that not so?

A Yes, sir.

Q And who was the first member after Raj' to come to the United States?

A My younger son, Yovinda (phonetic spelling).

Q I take it you have two boys and two girls? Am I correct?

A Yes.

Q Is Ravinda Mehra (phonetic spelling) sitting here in the courtroom?

A Yes, sir.

Q Did Raj' come by himself?

A He with my older son, Rovinda Mehra -

MR. CAPLAN: I object to that.

THE COURT: No. I'll allow that.

Q How old was Rovinda when he came?

MR. CAPLAN: Can we fix the time?

Q What year was this?

A 1963.

Q How old was Rovinda at that time?

MR. CAPLAN: I'm going to object to that.

THE COURT: It's irrelevant but I'll allow it.

A Twenty-one years old.

Q Did you participate in arrangements for Rovinda to come to the United States?

MR. CAPLAN: I'm going to object.

THE COURT: Yes. Sustained.

Q When Rodney came to the United States - is that what you call him? Did he have any source of income when he came to the United States?

MR. CAPLAN: I'm going to object. He is here.

THE COURT: Sustained.

Q Where did Rodney live when he came to the United States?

A He lived with my older son, Raj'.

Q Do you know where that was at that time?

A It was in Brooklyn, Long Island University.

Q Did your son, at that time, have any connection with Long Island University?

MR. CAPLAN: Your Honor, this is all remote in time.

THE COURT: Yes. I really don't see what relevancy it has.

MR. FEDER: I'll try to get to it.

Q Did other members of your family come over after Rod'?

A Yes. My wife and my youngest daughter and myself.

Q The three of you at one time?

A Yes.

Q Where did you go?

A With my oldest son, Raj'.

Q And was Rodney still living here?

A Yes.

Q What year was that?

A 1967.

Q Did either of you, your wife or your mother, work in the United States when you first came?

MR. CAPLAN: I'm going to object to that.

THE COURT: 1967? No. I'll allow it.

MR. CAPLAN: I object to the question then, including what Mr. Mehra said about his mother, as being irrelevant.

THE COURT: The mother is not encompassed in the question.

MR. FEDER: I did encompass the mother in the question.

THE COURT: Did either you or your wife work when you first came here in 1967?

THE WITNESS: No, sir.

THE COURT: All right.

Q Will you be good enough to tell us how you sustained yourself?

A I was being supported by my oldest son, Raj'.

Q How long a period of time did your son, Raj', support you?

A The first job I got was in 1969.

Q How long were you in the United States

before you got your job?

THE COURT: Two years?

A One year and about five months.

Q When, in 1967, did you come?

A August.

THE COURT: When did you get your first job?

THE WITNESS: I got it in February, 1969.

THE COURT: All right.

Q Was there a period of time when you first came to the United States that the law did not permit you to take a job?

MR. CAPLAN: Objection.

THE COURT: Sustained.

Q Had your wife obtained any employment before you got your first job after you came?

A Yes.

Q How long after you were here did she get her job?

A She got her job in January, 1968.

Q Did your mother ever work since she came to the United States?

MR. CAPLAN: Objection.

MR. FEDER: Withdrawn.

Q Was your mother ever your dependent?

A Yes.

MR. CAPLAN: Objection.

THE COURT: Sustained. Strike out the answer.

Q Did your mother have any independent source of income?

MR. CAPLAN: I object to that.

THE COURT: Well, step up here a minute.

(Whereupon, counsels approached the side portion of the bench)

I know what you're trying to do. You're trying to say that he felt some obligation to support his mother, that that enables him to take credit for whatever the son gave but if the son sponsored the grandmother and Raj' sponsored the grandmother coming over here, he didn't have the obligation to pay her but under Pennsylvania law, she is not obligated to get paid any money, for the grandmother, so I don't think it holds water.

MR. FEDER: I agree with your recitation as being correct. It's not that he felt

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* * *

Q Mr. Mehra, you told us that Raj' sponsored the arriving in the United States of Rod' and I believe you also told us that Raj' sponsored the arriving into the United States of you and your wife and your mother.

Did Raj' sponsor the arriving into the United States of anyone else?

MR. CAPLAN: I object to "anyone else" as irrelevant.

THE COURT: For the daughter, I assume?

A My daughter and my son-in-law. One had already come with me.

Q When was it that your entire family, you, your wife and mother and daughter and son-in-law, were in the United States the first time?

A July, 1968.

Q Where did you all live at that time?

A 175 Willoughby Street, Brooklyn.

Q Whose residence was that?

A Raj' Mehra.

Q Could you describe the apartment?

A It was a two-bedroom apartment.

Q Who paid for the upkeep of the apartment?

A My son, Raj'.

Q What year was that?

A 1968.

Q Was Raj' working at that time, to your knowledge?

A Yes.

Q What was he doing?

A He was teaching in Long Island University and shifted in the meanwhile to Simon and Shuster.

Q When he got paid, do you have any idea what he did with the money he received?

A He brought down the money that he got and gave it to me.

Q What would you do with the money?

A Part of the money I deposited in his checking account and the balance I kept it for running the house.

Q So, you ran the house with Raj's money?

MR. CAPLAN: I object to the repetitive statement.

MR. FEDER: I'll withdraw it.

Q Who was the boss of the house in the sense of who ran the house?

MR. CAPLAN: I'm going to object to that too.

I think he has testimony and is trying to repeat it.

THE COURT: Yes. He stated he took part of the money and put it in Raj's account and the receipts for the household.

Q Do you know where Rad's account was?

A First National Bank in Brooklyn.

Q I show you the exhibit in evidence and ask you to be good enough to tell us what that is (indicating).

MR. CAPLAN: I'm going to object. I don't think it's in evidence.

THE COURT: Yes. It is. We discussed this, yes. I accepted it in evidence.

MR. CAPLAN: I'm not sure if I was able to make a record.

MR. FEDER: I'm sorry. We don't have to do that now.

THE COURT: Come up.

MR. CAPLAN: I would prefer the witness' testimony.

THE COURT: All right.

Q Will you be good enough to tell us what Plaintiff's Exhibit 11 is that you're holding in your

hand?

A These are deposit slips to the bank in favor of my son, Rod', written by me.

THE COURT: In your handwriting?

THE WITNESS: These are in my handwriting.

Q In approximately what period of time?

A '68, '69, '67.

Q Could you just read off some of the deposits, a few?

MR. CAPLAN: I would object to that.

THE COURT: Give the date.

THE WITNESS: August 26, 1968 - $100.;

August 15, 1968 - $50.;

August 12, 1968 - $100.

Q OK. That's sufficient. Thank you.

MR. CAPLAN: Can I have a voir dire, your Honor?

THE COURT: The document is in evidence.

MR. CAPLAN: Can I have a voir dire concerning the document?

THE COURT: No. You can ask on cross-examination.

MR. CAPLAN: Are you going to ask him any further questions on this?

MR. FEDER: Give Mr. Caplan the deposit slips.

(Whereupon, the witness handed papers to Mr. Caplan)

Do you want me to wait?

MR. CAPLAN: No. Go ahead.

MR. FEDER: With the Court's permission, I would like to read from Plaintiff's Exhibit 3 which recites Raj's job and job title.

THE COURT: Very well.

MR. FEDER: From August of '62 to September of '63, he worked for the American Institute of Physics at 355 East 45th Street and his title was Editorial Assistant.

From September of '63 to January of '66, he worked for the Orange County Community College in Middletown, New Jersey and his title was Instructor of Mathematics.

From August/63 to June of '64 and also January/66 to June of '66, he worked for the Western Publishing Corporation, 50 Third Avenue, New York [illegible]h a title of Managing Editor -

From September of '64 to August of '67, he worked at the Long Island University's Flat-

bush Extension, Brooklyn. His title was Instructor of Mathematics.

In September of 1967 to the present and there is no indication of what that "present" is, he worked for Simon and Shuster at 1 West 39th Street, New York, as Managing Editor and Technical Outliner, Technical Library.

Q To your recollection, how long did he work for Simon and Shuster?

A Four years. A little over four years.

Q Sometime past September of '71?

A Yes.

Q Did he have a job subsequent to working for Simon and Shuster?

A Excuse me, please. Please repeat that.

Q After Simon and Shuster, did he go to work for someone else?

A He was working for Simon and Shuster and under contract to write books for them.

Q Do you know if he had any contracts with Simon and Shuster to write any books?

A Yes, sir.

MR. FEDER: At this time, I'll just refer to Plaintiff's Exhibit 4-A and 4-B, both marked

into evidence and with the Court's permission, I would just like to read what it is.

THE COURT: Go ahead.

MR. FEDER: This is an agreement between Rajinder Mehra and Simon and Shuster wherein the author grants to the publisher, meaning Simon and Shuster, during the full term of the copyright, with all renewals, etc., the sole and exclusive rights to publish and exclusive rights to sell throughout the world the work entitled, "College Mathematics" and there is a division of the moneys or the royalties or the proceeds that are to be derived from this publication and the author, Rajinder Mehra to receive one-third of the moneys and the publisher is to receive two-thirds.

Exhibit 4-B is the same thing, an agreement between Simon and Shuster and Hajinder Mehra to work on a book on college chemistry and divide the royalties with one-third to Raj' and two-thirds to the publisher.

Q To your knowledge, was he working on these manuscripts?

A Yes, sir.

* * *

* * *

the answer.

THE WITNESS: I would have known.

Q Is it fair to say that no money was paid under either of these contracts?

A I would say so.

MR. CAPLAN: Thank you.

MR. FEDER: Exhibit 9 is only marked for identification?

THE COURT: That's right.

MR. FEDER: I offer it in evidence.

MR. CAPLAN: I would object to it.

THE COURT: Sustained.

BY MR. FEDER:

Q Did Raj' work on any books that were completed before he died - withdrawn - These manuscripts we referred to, pursuant to the contract, they never were completed before he died, were they?

A No.

Q Were there manuscripts or books that were completed?

MR. CAPLAN: I'm going to object to the "manuscripts or books".

THE COURT: I'll allow the books.

MR. FEDER: I'll reword the question to

books.

Q Were there any books that Raj' worked on that were completed?

A He was editing books for Simon and Shuster and those books were published, the seven-volume books.

Q He didn't write any? He just edited what someone else had written?

A Yes. It was someone else's and he edited it.

Q I refer to Plaintiff's Exhibit C for identification -

MR. CAPLAN: Your Honor, I believe this was the subject or should have been the subject of a stipulation I had agreed to and will agree now again that Mr. Mehra was the editor of the books and counsel was supposed to supply the language of what that was titled.

MR. FEDER: That would come from one of the witnesses that takes the stand. Is there any objection if I just read the title of these books?

That's all I'll do at this point.

MR. CAPLAN: I don't see the reason for it but I'll be governed by his Honor.

MR. FEDER: I would prefer to read it.

THE COURT: But they are not in evidence.

MR. FEDER: Then, I would enter it in evidence.

THE COURT: Can this witness identify these books edited by his son?

MR. FEDER: Let me ask him.

MR. CAPLAN: I'm willing to concede that because counsel has shown me printed on the inside, "edited by Rajinder Mehra".

THE COURT: Let him read it.

MR. FEDER: Besides the titles of the books, all of them said, "edited by Rajinder Mehra" on complex variables, engineering mathematics, probabilities, statistics, transistor analysis.

Q Were there any dictionaries that Raj' was the editor of?

A Yes, sir.

Q Do you know how many?

A Four, sir.

MR. FEDER: With the Court's permission, may I read the titles of these four dictionaries?

THE COURT: Ye-

MR. FEDER: "Dictionary of Physics and Mathematics - Abbreviations"-, "Dictionary of Electrical Abbreviations"-, "Dictionary of Computer Age Systems" and "Abbreviation Signs and Symbols" and "Encyclopedia - Signs and Symbols".

Q At the time that Raj' died, what was he earning from his job?

A $15,000. a year.

MR. CAPLAN: I'm going to object to that unless there's some clarification.

Q Who was he working for?

A Academic Press.

MR. CAPLAN: Can we have the time the job started?

MR. FEDER: By all means.

THE COURT: Go ahead.

Q How long had he been working for Academic Press before he died?

A Approximately two months.

Q Where is Academic Press located?

A In Manhattan, New York.

Q At the time of his death, was he in business with Academic Press?

A Yes. He would go with his boss to Philadelphia and came back the same day. That was April the 3rd and the 4th, 1972.

Q What's his boss' name?

A Mr. Berler (phonetic spelling).

Q Do you know what his salary was at Academic Press?

A $15,000. a year.

Q At or about the time or before he died, late '71, early '72, you had already been employed? Isn't that so, Mr. Mehra?

A Yes, sir.

Q What was your occupation? What were you doing?

A As an accountant.

Q Did you work as an employee for someone else?

A Yes. Zal Corporation, 450 West 23rd Street.

THE COURT: Is that Z-A-Y?

THE WITNESS: Z-A-L.

Q When did you start to work at that place?

A 1969.

Q Are you still working there today?

A Yes. I am.

Q So, in the last few months or a year of Raj's life, did he give any money to you?

MR. CAPLAN: I'm going to object to that. You've got to be more specific than that.

MR. FEDER: All right.

THE COURT: How long were you with Zal?

THE WITNESS: I joined them 1970.

THE COURT: To 1972, you were with Zal?

THE WITNESS: Yes, sir.

THE COURT: What were you being paid by Zal in 1970?

THE WITNESS: $11,000.

THE COURT: And in 1971?

THE WITNESS: There is no raise in 1971.

THE COURT: What about '72?

THE WITNESS: I was given a raise of $500.

Q What was the year you told us you came to the United States?

A 1967.

Q Was there any period of time from 1967 until the time that Raj' died - withdrawn - You lived with Raj'; is that correct?

A Yes.

MR. CAPLAN: Your Honor, this is repetitive.

MR. FEDER: I'm trying to develop it.

THE COURT: I'll sustain it. He already testified what Raj' gave him and what he did with it.

Q At the time Raj' died, was he, at that time, contributing any money towards you or your wife?

A Yes, sir.

Q Approximately how much money would he so contribute?

A He would give me about a hundred to $200. a month.

Q What did you do with that money?

A I gave it mostly -

MR. FEDER: I withdraw that question, your Honor.

MR. CAPLAN: May I have a voir dire?

MR. FEDER: By all means.

THE COURT: Well, all right. It's not the proper subject of a voir dire.

MR. CAPLAN: I think it is, your Honor.

THE COURT: The only testimony we have

at the moment is a hundred to $200. a month was given to Mr. Mehra.

MR. CAPLAN: I think there's been a misunderstanding and I'd like to clear it up.

THE COURT: You can bring that out on cross-examination. At the moment, that's all there is.

Go ahead.

Q At the time that Raj' died, did he have any bank account in his name?

A Yes, sir.

MR. FEDER: I offer Plaintiff's Exhibit 10 in evidence and with the Court's permission, I'd like to read that at the time of his death the closest entry was May 1st of '71 of $2268.14 in the account.

Actually, the account now says Rajinder Mehra by Roshan Mehra as Administrator.

(A bank book previously marked Plaintiff's Exhibit 10 for identification was marked in evidence)

Q Is it fair to say or assume this is the same account as existed on his death and was transferred to you as the Executor of your son's estate?

A Yes, sir.

Q What was the status of your son's health in April of '72?

A Very good.

Q I show you Plaintiff's Exhibit 8, marked for identification (indicating).

Would you be good enough to tell me if this is a true and accurate picture of your son? Is this a true and accurate picture of your son at the time?

MR. CAPLAN: Note my objection.

THE COURT: Overruled.

Q Tell us approximately when it was taken?

A It was taken approximately, if I correctly remember, about a year or two before his death.

Q A year or two before his death?

A Yes.

MR. FEDER: With the Court's permission, may I pass it among the jury?

THE COURT: No. You may offer it in evidence.

MR. FEDER: I offer it in evidence.

MR. CAPLAN: Objection.

THE COURT: Overruled.

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How long before he died did you engage him? How long did he work for you?

A It was a little over a month.

Q What was his job?

A He was hired as a Procurement Editor, mainly in economics and operations research and related some of the engineering types of things that I had under my wing.

Q I will ask you to elucidate. What is a Procurement Editor?

A His job is to go out into the field, out to professors and research workers and convince the qualified people to write books for us to publish.

Q In other words, he helped you to gain the wherewithal to ultimately sell to the public?

A Yes.

Q How would you describe his competency as an employee?

A Well, as you know, one month is a little difficult to make any evaluation. I thought he showed promise based on his background, based on our discussions, based on the number of times over that first month where we mutually went out to discuss the programs with our consulting editors, with specific authors or we spent

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Q Where did you and Raj' go?

A Philadelphia.

Q How did you travel there?

A By Metroliner.

Q Did you effect your business in Philadelphia that day?

A Yes.

Q I assume you got there sometime before noon. Did you and Raj' part company?

A Yes.

Q Who went where?

A I took the Metroliner back to New York and he remained in Philadelphia.

Q Did he remain in Philadelphia on company business?

A Yes.

Q To your knowledge, what was his intentions after he left you?

A He was going to stay overnight in Philadelphia and drive the next day to Allentown to visit Lehigh University where he had an appointment.

Q You said "drive" but he didn't have a car, did he?

A Not when I left him. He didn't have a

car. He was going to pick up a rental car in Philadelphia and drive to Allentown.

Q To your knowledge, did he do that?

MR. CAPLAN: I would object.

THE COURT: Sustained.

Q Was that the last time you spoke to Raj' in Philadelphia?

A Yes.

Q I take it the next thing you learned was that he had his unfortunate occurrence and that was the end of Raj'?

A That is correct.

Q Would you be good enough to tell us what salary Raj' would be earning, approximately, at this time, if he continued to stay in the employ of Academic Press?

MR. CAPLAN: I'm going to object to that.

THE COURT: Assuming his work had been satisfactory and had been of the same caliber that he had performed during the month in which he was in your employ and assuming his health remained good and assuming all other things being normal, at what salary scale would he have been presently employed?

MR. CAPLAN: Your Honor, I think that calls for speculation.

THE COURT: No. The jury understands the substance. Assuming all those occurred normally and he hadn't left the job and was still employed and performing in the same fashion, can you give us an estimate of what the salary would have been?

THE WITNESS: If I could make one further assumption, the $15,000, as a beginning salary was correct, then it would be somewhere around $20,000., at least.

THE COURT: At this point?

THE WITNESS: At this point.

Q Would you say there was still further advancement for salaries beyond today?

MR. CAPLAN: I'm going to object.

THE COURT: I'll sustain the objection.

Q Is $20,000. the top of the ladder for his type of job?

MR. CAPLAN: The same objection.

THE COURT: Sustained.

Q In earning $20,000. today, if he were in good health and continued to stay and continued to

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A Yes.

Q How long did he stay with you at the university?

A Until the spring of 1967.

Q Is that about three years?

A Three years exactly.

Q And during those three years, were you his superior?

A Yes.

Q And did you have occasion to observe him professionally?

A Yes.

Q And what observations had you made in three years about him in his professional capacity?

A He was a good teacher. He knew his subjects that he taught. He was very flexible in giving him the program for each semester. He was very cooperative.

Q Could you tell us about his attendance at class? Number 1, was his attendance good as a teacher?

A Yes.

Q How did he relate to the faculty?

A He was very cooperative with the faculty, with the department itself.

As I said he volunteered in whatever requests

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same manuscript as Mr. Mehra?

A Yes.

Q In what capacity did you do work on this manuscript?

A As a technical educator.

Q Do you know what percentage of that work has been completed?

A Yes, at the time, about 80 percent of the work.

Q The contract that he has with Simon & Schuster says --

MR.CAPLAN: Excuse me, I'm sorry. I think the professor indicated that he was not familiar with the contract or terms of the contract.

THE COURT: That's all right. It's in evidence. He says 80 percent of the work is completed. He's going to read him a portion of the contract.

A The contract has nothing to do with the manuscript. I said 80 percent of the work as far as the manuscript is concerned but --

THE COURT: But it has nothing to do with --

THEWI 'ESS: With the contract.

THE COURT: He said the contract has nothing

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Q And your son continued to live in the apartment that he lived in before?

A Yes, sir.

Q Did you have occasion to see him any more after that?

A He used to come every weekend.

Q What did a weekend consist of?

A Friday evening he would come and stay there, Sunday -- or he would go on Sunday evening or Monday morning for his work.

Q You had a place for him to sleep?

A Yes.

Q What did he do on weekends?

A He wanted to make a library. We made a completed attic to make an office for him and library for him to work.

Q Did he participate in making of the attic?

A Yes.

Q Did he do anything else while he stayed at your house?

A He would drive us sometime for entertainment, movies.

Q Did you have a car?

A He bought me a car in 1970. He had a car. I

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an adult?

A About 3 inches taller than me, 5 feet 10 inches.

Q Are there any other ways that you can tell his Honor and the jury how he expressed his affection to his mother and father?

MR. CAPLAN: I'll object to that, your Honor.

THE COURT: Sustained as to form.

Q Will you describe in terms of specific acts, his relationship to his mother and father?

A Because we were about to buy an automobile and he bought me an automobile, and this is the proof of it. It was bought December of 1970 and he signed for it.

Q Did you buy this on time?

A On time payments.

Q When you say he signed, does that mean --

A He paid $1,000 in advance for down payment.

Q And what did he sign for?

A As a co-buyer.

Q As a co-signature on a note. What else can you tell us that your son did that would, in any way, demonstrate his relationship to you or to your wife?

A My younger daughter had gone to Wisconsin University for a B.S.

* * *

... the time of his death, was he in
business with Academic Press?

point. You called the cases to my attention. The difficulty I have at this stage of the proceeding, and frankly, two inferences can be drawn from the testimony of the defendant which were read.

One inference is that the plaintiff was never visible to the defendants, and the other inference is that the defendants were not looking. That's a question of fact for the jury at this stage.

MR. CAPLAN: Even if you accept the second inference, I do not, for a moment, suggest that the proof is acceptable. What your Honor would be saying, the accident occurred, so he must not have seen or he must not have been looking, that would not be true without proof. I would ask that my memorandum be made a part of the record so everything is in the record for this purpose, but you cannot speculate as to the actions of the pedestrian, even if you accept and say, I'm satisfied, and say Mr. Bentz wasn't looking. What was Mr. Mehra doing?

THE COURT: You asked me to rule on that as a matter of law. It's at this point -- I'm not prepared to do so.

MR. CAPLAN: The Court, or the trier of the

facts, whether --

THE COURT: All I would do at this point is reserve decision on your motion and reserve decision on the question and let it go through at least one more stage to see what the total proof shows. I will reconsider the question before sending it to the jury, but I submit that given what I know about the case, that I would let it go to the jury. I think it's perhaps a thin line, but I think it's enough to get there.

MR. CAPLAN: Instead of burdening the record, I would just say that there are -- I supplied your Honor not only with the brief, but with the cases and there is extensive language in the law with respect to situations of this nature; and an accident of this nature, where the proof is similar to this, and where the burden is similar in one case a man was --

THE COURT: You are dealing with a wrongful death action.

MR. CAPLAN: One of the cases that I cited was Alul versus White; in that case the plaintiff was rendered mentally incompetent and he couldn't testify, and the degree of proof and burden of proof is the same as in a wrongful death, he couldn't

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Q And the Volkswagen that you were in, was that a bent seat or bucket seat?

A Bucket seat.

Q And was your wife seated next to you?

A Right.

Q In her seat?

A Yes.

Q And what were you doing as you were going along 309 in the Cedarcrest Boulevard, in that area of the Cedarcrest Boulevard area?

A I was driving. I had my hands on the wheel, paying attention to the road, operating my vehicle.

Q At the time that something happened, were you talking to your wife?

A No.

Q Do you talk to her sometimes during the trip?

A Occasionally we would have a word or two.

Q Did you have a radio in the car?

A Yes, I did.

Q Do you recall whether the radio was on or not?

A It was off.

Q What was the temperature, was it cold, warm?

A I can't recall accurately. I believe it was

MR. FEDER: May I see it?

May I pass this amongst the jury?

THE COURT: Hold it down in front of them.

(Jury looking at photograph, plaintiff's exhibit 2E.)

Q Now, Mr. Bentz, you say this accident took place at or near the apex of the hill?

A Correct.

Q And that is the apex that you just marked with an X?

A I wouldn't say that's the apex.

Q Excuse me. The X reflects more or less where the accident took place?

A An approximation.

Q Can you tell us the grade of the hill at that point, your approximation of the grade?

A In what respect?

Q In degrees?

A 15, 20; 15 or 20 degrees.

Q What would you estimate to be the site distance at the point that your car and Mr. Mehra had contact with each other?

A I don't understand.

Q How far ahead of you could you see apart from

Volkswagen, 4th to 3rd?

A Slow down, stop inclines.

Q Slow down or inclines.

This was an incline, am I correct, but you did not down shift?

A No.

Q Now, you told us, did you not, Mr. Bentz, that the road was clear. It's essentially a straight road. It may not be according to your definition, interpretation of the terrain, a level road.

As a matter of fact, you say it's not level, it's hilly, but it's straight. It's not a curvy road. Is that fair or not fair, essentially?

MR. CAPLAN: Just so there is no confusion, that's about four questions.

THF COURT: Is it a curved road or straight road?

THE WITNESS: To be perfectly frank it's both. It runs from --

THE COURT: But at this point?

THE WITNESS: It's relatively straight.

Q And I take it you had your high beams on at that point?

A Yes, I did.

Q Were you putting on the low beam every time

Q Did you ever tell us -- by us, I mean me or another lawyer, that you didn't see anything before you heard the thud?

A That's possible.

Q If I read to you from page 38 of the examination before trial -- tell me if this refreshes your recollection:

"Question: Am I correct, prior to the time that you heard the thud you didn't see anything in front of you?

"The Witness: Correct."

Doesn't that refresh your recollection as to whether or not you saw anything before you heard the thud?

A Yes, it does.

Q And what would be your answer now?

A I'll repeat again, the instant before the noise of the car, the crashing sound, there was an image to the left front of my car.

Q You saw the image before the thud; am I correct?

A An instant before.

Q An instant before?

A Yes.

* * *

* * *

Q Was the windshield shattered out or in?

A Shattered in.

Q As a matter of fact, were there any cuts on your face or body?

A It was a nick, scratch.

Q But the glass came in; am I correct?

A Yes.

Q Now, are there any other dents or marks on that Volkswagen that were not there before the happening of the accident?

A Not that I can determine; no.

Q How about the dent on the front fender, on the left side?

MR. CAPLAN: I believe the witness misunderstood the question.

MR. FEDER: Perhaps you did.

My question was:

Are there any other marks?

MR. CAPLAN: When you say other, that's confusing.

THE COURT: Let him answer the question.

Q Other than the broken windshield, are there any other marks on the car that were not there before you struck Mr. Mehra?

A Are there any other marks on the car that are not here?

Q That were not on the car.

MR. CAPLAN: I believe the form is bad.

THE COURT: The form is all right. Let him ask the question. It's not that confusing. It's cross examination.

Q Looking at that photograph, do you see any other marks on your car that did not exist before the happening of the accident?

A I see the car here after the accident. I'm confused what you are saying prior to the accident.

THE COURT: Is there anything there shown in that picture that was not there before the accident besides the broken windshield?

THE WITNESS: There is a broken antenna and a shattered side window, and a dented fender and a switch light, turn signal light.

Q You say there is a broken fender; is that -- Is there a marking on the broken fender already?

A There is a D, I think.

Q And that's the place where the broken fender was. That's the left front fender?

A Yes.

Q Are there other markings specifically with

respect to the front bumper that was not on the car before the accident happened?

A There are no dents or scratches or anything like that.

Q Are there any exterior marks rather than dents or breaks? Is there anything added to the car that was not there before? Look at the front fender?

A Okay, I see there is an X here.

Q I don't know if there is an X there. Who put the X there? You looked at this photograph once before; am I correct?

A Yes.

Q Looking at the front fender, what do you see now, that's in that photograph which is not --

THE COURT: Front fender or bumper?

THE WITNESS: Bumper.

MR. FEDER: I apologize. I meant bumper.

Looking at the front bumper, Mr. Bentz, what do you see on that photograph which was not on the front bumper before the happening of the accident?

MR. CAPLAN: I object to that. He wants to asks him what he sees on the front bumper, that's fine, but the additional part I'll object to.

THE COURT: If there was something that was

not there before the accident.

Q What do you see on the front bumper, without telling us what you see, was that there before the happening of the accident?

A To be perfectly frank, I have no way of telling.

Q So it's your testimony that you don't remember whether or not that was or wasn't there before the happening of the accident?

MR. CAPLAN: I'm going to object to that, it's argumentative.

THE COURT: He said he has no way of knowing.

Q I'll read from 48A:

Mr. Bentz, do you recall being asked this question previous to being in court today?

"Question: My question is about the bumper. You see where I pointed my pen?

"Answer: No, you'd better come back.

"Question: Now, looking at that place where I had drawn an X, can you tell us what you see there?

"Answer: The bumper.

"Question: You see the bumper?

"Answer: Right.

"Question: But the portion of the bumper where

there is an X, is there anything different in that portion from the rest of the bumper?

"Answer: Yes, it looks brushed as if there is dust on the bumper and it had been brushed.

"Question: Is it darker in the photograph?

"Answer: Yes, darker than the remaining part of the bumper.

"Question: You say it looks brushed. Is that the word you used?

"Answer: It looks like someone brushed their hand on it."

MR. CAPLAN: I don't see --

THE COURT: Wait a minute.

MR. CAPLAN: I am sorry.

MR. FEDER: Do you recall being asked those questions and giving those answers?

THE WITNESS: Yes.

BY MR. FEDER:

Q Does that refresh your recollection at all as to how, if you know, the marking came on the front bumper?

A Yes.

Q Please be good enough to tell us.

A As far as I can recall, I mentioned before, when we finally stopped and my wife and I checked each other,

we met at the front of the car and the entire incident was awfully confusing and rather dramatic, and as far as I can recall, the portions that counsel is referring to where we either leaned or sat in the process of trying to recompose ourselves after the incident.

MR. FEDER: Can I pass that photograph to the jury?

THE COURT: Yes, you may.

(Photograph exhibited to the jury.)

Q I believe you told us, Mr. Bentz, that the radio was on. Did you have a tape deck playing at all?

MR. CAPLAN: I'll object to that.

THE COURT: It's the jury's recollection.

Q You told us that the radio was not on; is that correct?

A Yes.

Q My question is, did you have a tape deck playing?

A No.

Q Didn't have it equipped with the car?

A No.

Q Now, do you have a recollection, trying to recall what you and your wife actually were doing, if anything, at the time you approached the apex of the hill that you

Q And they stayed around for a while?

A Yes, I imagine so. I don't remember much other than our immediate encounter. I don't remember anything of their actions.

Q And did it occur to you to get their names and addresses?

A At that time my wife and I were rather upset and getting names and addresses at that time seemed to be awfully far removed.

Q The fact is you didn't get their names or addresses?

A No.

Q When you went back with the police car to the scene of the occurrence, I take it you could not, if I show you a photograph of someone lying on the roadway, you would not tell us whether that was the person that you struck or not?

A I don't believe so.

Q Because you never looked?

A No.

MR. FEDER: I have no further questions.

REDIRECT EXAMINATION

BY MR. CAPLAN:

Q Mr. Bentz, Mr. Feder read to you prior

AFTERNOON SESSION 93

MR. CAPLAN: I'll call J. Shoemaker.

MARTIN JEFFREY SHOEMAKER,

called as a witness, having first been duly sworn by the Clerk of the Court, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. CAPLAN:

Q Doctor, will you keep your voice up so you get back me.

Where do you reside?

A In Philadelphia, Pennsylvania.

Q And would you tell us what is your present employment?

A I am currently employed by the Commonwealth of Pennsylvania, Department of Health,Bureau of Laboratories. My specific function is Chief of the Clinical Toxicology Laboratory.

Q Tell us something about your education and background leading yourself to the point where you took your present position?

By the way, when did you take your present position?

A In December of 1971.

Q Now, will you tell us something about your

Do you have any objection?

MR. CAPLAN: No objection.

THE COURT: What is the exhibit, exhibit 18?

THE CLERK: Ledger page received in evidence as Plaintiff's exhibit 18.

(So marked.)

BY MR. FEDER: (continuing)

Q Now, you don't know the person who drew the blood personally?

A No.

Q And you have have no control set up to supervise the drawing of the blood?

A Yes; that's correct.

Q Do you know how many samples of blood were actually drawn?

A No, sir, I don't know. I only have an indication that we received a tube full of blood that was collected. I don't know actually how many were collected.

Q Is it fair to say that the drawing of more than one sample is assured to guarantee accurately, than just the drawing of one sample?

A We prefer two.

Q But in this instance only one was drawn? Your preference is two, you say, but in this case there was only

THE WITNESS: Yes.

Q There is no bottle or container?

THE COURT: The tube.

Q Could I see the tube?

A I have samples of the tube here.

Q Now, let me ask you this:

These are the three tubes?

A Two tubes and a syringe which we provide.

Q Number 1, how long do you preserve the tubes of blood samples which you analyze?

A For approximately two years.

Q Did you make a search, whether or not the blood sample taken from Reginda Mehra was preserved?

A I did not.

Q Then you have no independent knowledge as to what label was on Mr. Mehra's tube, whether it said Reginda Mehra? You gave us a report as to what a certain test showed. Do you have any knowledge yourself that this was a test of the tube of the blood taken from Mr. Mehra?

MR. CAPLAN: I'll object to that. His name is on the form.

THE COURT: He's asking whether he has any knowledge on the subject.

THE WITNESS: We received a tube of sample

which bears a number which is the same number of the form with the deceased's name on it. Thereby this is how we are able to inventory and locate samples.

Q My question to you is, did you ever see the tube itself, this particular tube, with Mr. Mehra's blood in the tube?

A I probably did. I can't remember the exact details of what is on the tube.

Q Did you participate at all in the analysis of this blood?

A Not directly. I supervised the whole operation.

Q Did you supervise this particular analysis or did you just supervise in general?

A Just in general.

Q How many different people do you supervise?

A At that time there were four.

Q Do you have any independent recollection of supervising the testing of Mr. Mehra's blood or is it fair to say the first time this was brought to your attention is when you were contacted by the lawyer or representative of the lawyer?

A Well, I have general supervision and

responsibility to see that the test is properly conducted at all times. I can't remember specifically this sample because we do so many of them.

Q So, it's fair to say with respect to supervision in this particular case, you have no recollection just as you generally supervise your men?

A Yes.

Q And who was it that actually did the analysis?

A Mrs. Katherine Mayo.

Q Is she still with you?

A No, she's not.

Q Wouldn't she be the one most equipped to tell us what the analysis showed, what she actually did?

MR. CAPLAN: I'll object to it as being argumentative.

THE COURT: I'll allow it.

Q Do you understand my question?

A There are two statements I would like to make in that regard.

Q The lawyer for the defendant who produced --

THE COURT: He's entitled to explain it. He already said she wasn't present.

THE WITNESS: First of all, when a person ceases employment with the Department of Health,

* * *

Q I show you these photographs, and I ask you whether they are a fair and accurate representation of the condition of the car after the impact took place?

A Yes, they are.

Q And am I correct, is there a dent in the fender?

A Yes.

Q And the windshield is broken?

A Yes.

MR. CAPLAN: I don't believe I showed these pictures to the jury.

THE COURT: B-1 to B-5.

MR. CAPLAN: I don't have a recollection of doing that. If I didn't, let me just do that now.

(Counsel showing photos described above to jury.)

MR. CAPLAN: I have no further questions. Thank you.

CROSS EXAMINATION

BY MR. FEDER:

Q I only have a few questions, Mrs. Bentz.

I believe you told us that your husband was going 55 miles an hour?

A Approximately 55.

Q And that was at the time of the occurrence?

A Approximately around that, before the occurrence; yes.

Q Just before the occurrence?

A Yes.

Q And on what basis did you make that?

A Just as a matter of course, when I'm a passenger in a car, I just generally glance over at the speedometer.

Q In this case you looked over at the speedometer just before the accident?

A Sometime before the accident; yes.

I can't say a second before, you know.

Q Where is the speedometer located?

A In the front of the steering wheel, directly in front of the driver.

Q Could you see that speedometer just by sitting back in your seat?

A I would probably have to lean over a little bit, not much.

Q You recall looking at the speedometer a short period of time which you identify to be how long?

A I couldn't say exactly how soon before the accident.

* * *

see it, because if he came up on the apex on the hill, he was hidden by the hill.

MR. CAPLAN: Let me say, if you got further back on the road from the direction that he was travelling, there might be further back, it might look different. The road comes up, it doesn't come to a peak. The road comes up and levels off.

THE COURT: You want to have this witness? You want to delay the trial for another day?

MR. FEDER: I won't press it.

THE COURT: When are you going to have summations?

MR. CAPLAN: I must admit I'm faster than I thought I was.

I would prefer starting tomorrow.

MR. FEDER: My purpose is to prepare a summation.

THE COURT: How long will your summation take?

MR. FEDER: About an hour.

MR. CAPLAN: We can get this whole thing to the jury by noon.

THE COURT: I'm picking a jury in another case at 2 o'clock.

MR. FEDER: I tend to be long, Judge.

THE COURT: You want to start at 9:30?

* * *

* * *

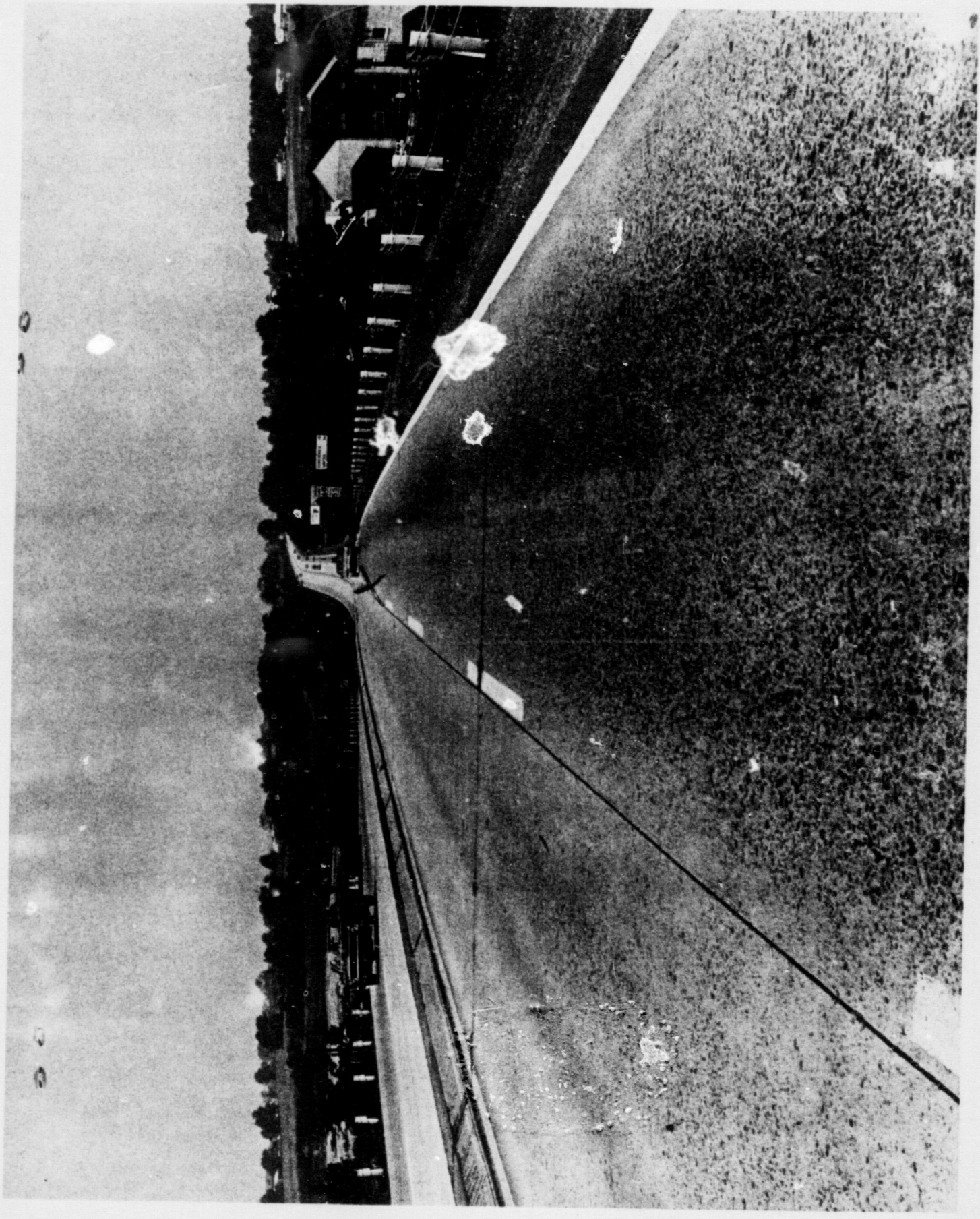
particularly concerned about the issue of the defendant's negligence.

It is conceivable to me that the jury could have found the defendant negligent based on the evidence, assuming that the burden of proof on the plaintiff, the deceased, is not all that great so it is conceivable that given the facts that negligence could have been found here but on the question of contributory negligence, I tell you, Mr. Feder, I have wrestled with this since you first walked into this courtroom and I find it, at the moment and maybe you can persuade me but I find it very difficult to understand how a person could be standing in the middle of the road or walking in the middle of the road , on a high-speed highway at 11:30 at night, dead drunk, and not be held to be contributorily negligent and those are facts.

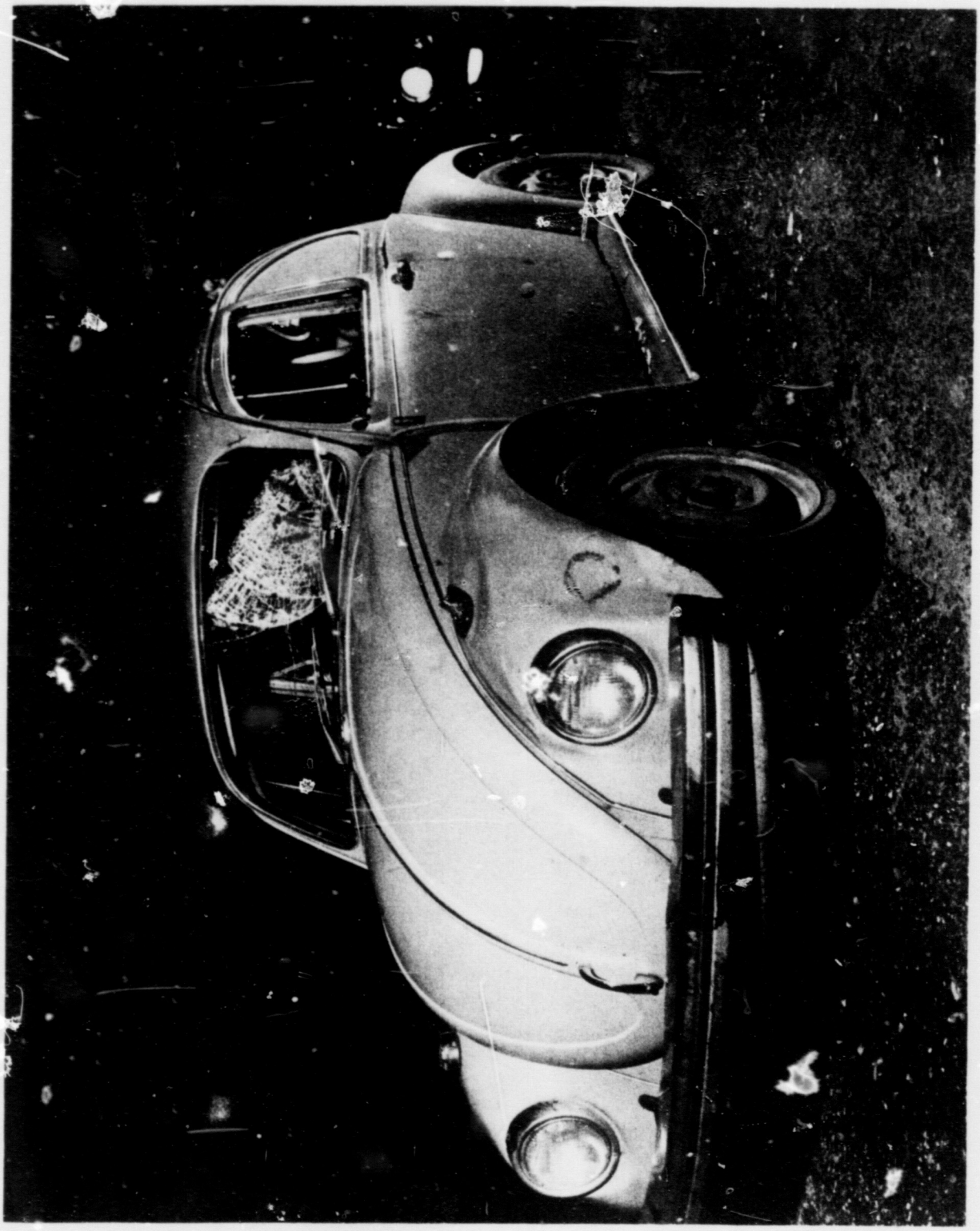
You can't get away from the facts. It's just very hard for me to visualize how a person can be contributorily negligent under any combination of circumstances and prevail

* * *

PLAINTIFF'S EXHIBIT 2C - PHOTOGRAPH



PLAINTIFF'S EXHIBIT 2G - PHOTOGRAPH



OPINION OF PLATT, D.J., DATED April 3, 1975

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ APR 3 1975 ★

TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA, Deceased,

Plaintiff,

-against-

ROBERTA BENTZ & RUDOLPH J. BENTZ, JR.,

Defendants.

- -x

72 C 787

OPINION

April 3, 1975

PLATT, J.

Defendants move pursuant to Rule 50(b) and (c) of the Federal Rules of Civil Procedure for a judgment notwithstanding a jury verdict in favor of the plaintiff in the amount of $10,000 on plaintiff's first claim and $69,500 on plaintiff's second claim on the grounds that: (i) there was no evidence of negligence on the part of the defendants, and (ii) plaintiff's intestate was guilty of contributory negligence as a matter of law.

At the close of the evidence offered by the plaintiff and at the close of all of the evidence defendants moved to dismiss on the foregoing grounds and the Court in each case reserved decision.

In the alternative, defendants move pursuant to Rule 59 of Federal Rules of Civil Procedure for a new trial on the following grounds:

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(i) The verdict was contrary to the weight of the credible evidence.

(ii) The charge of the Court with respect to a reduced burden of proof on behalf of the plaintiff was erroneous under applicable Pennsylvania Law.

(iii) The charge of the Court with respect to the burden of proof necessary on behalf of the defendant on the issue of contributory negligence was in variance with Pennsylvania Law.

(iv) The verdict as rendered was so grossly excessive as to indicate a lack of proper deliberation on behalf of the jury and as such mandates the granting of a new trial.

(v) The weight of the evidence in the findings of the jury are so incompatible as to mandate a new trial.

Plaintiff's complaint was divided into two claims, the first for conscious pain and suffering (for which the jury awarded $10,000) and the second for support payments for his parents (for which the jury awarded $67,000) and funeral expenses (for which the jury awarded $2,500).

This is the second trial of this case; the first having occurred before U.S. District Judge O'rin G. Judd and a jury in November, 1973, at the conclusion of which the jury returned a verdict for the defendants.

During the course of the first trial, evidence was inadvertently admitted which indicated that plaintiff's intestate's life was insured under a life insurance policy for $100,000.; the beneficiaries of which were the plaintiff and his spouse (the deceased's parents). Even though Judge Judd instructed the jury during the course of trial and in his charge

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that they should disregard this evidence, he apparently felt that such admission was so prejudicial to the plaintiff as to require him to set aside the verdict for the defendants and order a new trial. Accordingly, the case came on for trial before this Court in February, 1975, and, as indicated, the second jury reached a diametrically opposed verdict.

On the instant motions the Court is required, of course, to view the evidence in the light most favorable to the plaintiff. Lebrecht v. Bethlehem Steel Corp., (2d Cir. 1968) 402 F.2d 585; Wenhold v. O'Dea, 338 Pa. 33, 35.

In this light, the facts are that Rajinder K. Mehra, age 32 years, was struck and fatally injured on April 5, 1972 at approximately 11:15 PM by an automobile driven by Rudolph J. Bentz, Jr. and owned by then Roberta Lintz (now Bentz) who was then the six year fiance of (and is now the wife of) Rudolph J. Bentz, Jr.

The automobile, a small Volkswagen, was travelling north on Route 309, a four-lane, divided, limited access highway in Salisbury, Pennsylvania, and at a point approximately 500 feet north of an access known as Cedarcrest Boulevard the accident occurred. As indicated, Route 309 consists of two lanes north and two lanes south and is separated by a center divider. There were no other cars on any of the four lanes; there were no eye witnesses and there were no lights except for the headlights on defendants' Volkswagen which were lit.

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The defendant Rudolph Bentz, Jr. testified (and his testimony was corrobotated by his wife and in part by his former professor) that he and his fiance had had dinner at the home of his former Professor Rabot; that he had had two cocktails during the hour or so before a 7 P. dinner, a glass of beer with dinner, and coffee after dinner; that his fiance and he had started for their homes at approximately 10:45 PM in her Volkswagen which he was driving; that they had turned on to Route 309 and were proceeding northbound in the right-hand lane at a speed of approximately 55 miles per hour; that the speed limit on such highway was 60 miles per hour; and that he was looking and observing the roadway in front of him as lit up by the VW's headlights. There was no other traffic either in front or behind them or coming in the opposite direction; the weather was dry and there was no illumination on the roadway except that which came from the VW's headlights.

Defendant Rudolph Bentz, Jr. testified further (and there was no evidence to contradict the same) that a split second prior to the impact he observed a glimpse or image of something to his left and in the next instance the impact occurred causing damage to the left side of his VW's left front fender and shattering the left side of the windshield in upon him. He said that he had no opportunity either to apply his brakes or slow his speed from the time that he first caught a glimpse of an image until the time of the impact. He testified further that he brought his car under control and brought it to a stop at a point which later proved to be approximately

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400 feet from where the plaintiff's intestate was found. One of the pictures of the VW taken after the accident shows a shadow or mark which was variously described as a "dirt mark" or "smudge" on the left side of the front bumper but other pictures introduced into evidence do not reveal any such mark. When questioned, both defendants indicated that such mark might have been made by one or the other of them shortly after the accident when they were sitting on the front of the Volkswagen discussing what possibly could have happened at a time before they were informed of the existence of plaintiff's intestate on the roadway. All of the pictures, however, definitely show (i) a dent on the left side of the Volkswagen's left front fender behind the headlight and (ii) a shattered left side of the windshield.

There was no evidence of any skid marks or of any attempt by the defendant Rudolph Bentz to bring his Volkswagen to an immediate stop. Indeed, the evidence quite clearly shows that neither of the defendants was aware of what happened until several minutes after the accident when the occupants of another car came up to them and advised them of the existence of plaintiff's intestate on the highway.

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Within a half hour or so after the impact, the authorities had arrived and plaintiff's intestate was pronounced dead. His body was removed to the offices of the local coroner where a blood sample was taken which, when tested, revealed a gross weight of alcohol in his blood of thirty-nine one-hundredths (0.39) percent. The supervisor of the testing laboratory testified that .10% alcohol blood content was presumptive of intoxication and .40% was evidence of a comatose condition in the average person.

Plaintiff argues that there was sufficient evidence from which the jury could infer that the defendant Rudolph Bentz should have seen the plaintiff's intestate prior to the accident; that the Volkswagen was being operated at a speed in excess of the 60 mph speed limit; and/or that said defendant, having had some drinks and his fiance in the car was driving at a speed or otherwise in a manner that his vehicle was not under control. There is nothing, however, in the record to support any such inference. The only testimony, (i.e., that of both of the defendants) is that the speed of the Volkswagen was 55 mph; that the vehicle was fully under control and that the defendant Rudolph Bentz was maintaining a normal lookout ahead. There is no evidence that he was in any way affected by the two cocktails that he had consumed several hours before the accident. All the testimony is to the contrary.

In Martin v. Marateck, 345 Pa. 103, A.2d (1942), the Pennsylvania Supreme Court reviewed the authorities in that State and under similar circumstances held that a verdict for the plaintiff could not be sustained. In the Martin case the decedent was struck by an automobile driven by the defendant on a public highway known as Route 11 at about 9:30 in the evening of June 8, 1940 at a point immediately east of the Village of New Kingston, Cumberland County. Route 11 is a main highway running between Carlisle and Harrisburg in an East/West direction and at the time of the collision the defendant was driving in a westerly direction. The decedent was first seen passing between certain gasoline pumps and a filling station building by a motorist driving up to purchase gasoline. The witness next saw the decedent near the middle of the highway just as the defendant's car was then "just upon him" and "just ready to hit". An inspection of the motor vehicle after the accident revealed that "it was damaged on the right side; the right cowl light and the right front door window was cracked". In holding that there was no evidence of negligence on the part of the defendant the Pennsylvania Supreme Court made the following pertinent comments (345 Pa. at pp 106-108):

"Viewing this evidence in the light most favorable to appellant, as we are required to do in passing upon the propriety of the nonsuit (Wenhold v. O'Dea, 338 Pa. 33, 35), we are nevertheless bound to conclude, as did the court below, that it was clearly insufficient to take the case to the jury on the issue of appellee's negligence. The mere fact that the deceased was struck by the automobile of appellee on a public highway, which is all that is disclosed with any degree of certainty, affords no proof that the appellee was at fault. In addition to establishing the fact of accident, it was incumbent upon appellant so to describe, picture or visualize what actually happened at the time of the accident as to enable one fixed with the responsibility for ascertaining the facts to find that the appellee was negligent and that his negligence was the proximate cause of the accident. See Fisher v. Amsterdam, 290 Pa. 1, 3; Lithgow v. Lithgow, 334 Pa. 262, 264; Skrutski v. Cochran, 341 Pa. 289, 291. This appellant's evidence obviously fails to do. The record is devoid of any evidence showing how Martin came onto the highway or what length of time he was in the highway before he was struck, and his actions and movements from the time he left the gas pumps until the moment of impact are left wholly unexplained, so that it is impossible to infer from the evidence presented that appellee saw or should have seen him on the highway a sufficient time before the accident to bring the automobile to a stop, if under proper control. Under such circumstances, and in the absence of any evidence that appellee was driving in an improper manner or at an excessive rate of speed, that his attention was distracted, or that his car was mechanically defective, a verdict in favor of appellant would necessarily be based upon pure speculation and conjecture, rather than upon any proof of negligence, and could not be sustained; McAvoy v. Kromer, 277 Pa. 196; Hadhazi v. Zero Ice Corporation, 327 Pa. 556; Pfendler v. Speer, 323 Pa. 443; Brooks v. Morgan, 331 Pa. 235; Wenhold v. O'Dea, supra; Skrutski v. Cochran, supra.

"McAvoy v. Kromer, supra, is a case closely in point here. There a child, seven years of age, was struck by an automobile, between crossings, on a city street. He was seen just as he left the curb to cross the street and was next seen either being struck or under the front part of the vehicle; no one saw him in the intervening space from the curb to the place of

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accident. On this state of the proofs, this Court held there could be no recovery for the injuries to the child, stating as follows (pp. 197-98): ' . . . to affirm appellee's case, we must hold that a mere collision between an automobile and a pedestrian or vehicle proves negligence; this it does not do . . . Was he run down by the car, the driver of which could have seen him a sufficient length of time to have guarded against it? The accident occurring between crossings, did he suddenly run in front of the car; was he crossing the street heedlessly; was he crossing the street without regard to traffic . . .; did he reach the south side of the street safely and suddenly dart back in front of the car; or did the car suddenly swerve, striking him? All these circumstances are left to conjecture; defendants might have been responsible for one or more of the causes and not so as to others. In such cases, where it is equally probable the accident may have resulted from either cause, there can be no recovery: Alexander v. Pennsylvania Water Co., 201 Pa. 252.' Another case substantially identical to the one in hand is Hadhazi v. Zero Ice Corporation, also supra. In that case deceased was seen before he was struck, about the middle of a thirty-feet wide street, not at an intersection, but the evidence did not disclose where he came from or what were his movements immediately before the automobile reached him. Witnesses testified they heard the brakes of the automobile screech and saw deceased in front of it, just how far away they could not say. As in the present case, no evidence was offered that the automobile was being driven in a careless manner, and no question of excessive speed or mechanical defect of the car was involved. In sustaining a compulsory nonsuit, this Court said (p. 559): 'We, therefore, have a situation where the only basis for the conclusion that the automobile was negligently operated must be the fact that deceased was in the street, and that the brakes screeched, indicating that the driver of the car was endeavoring to stop it. This was not sufficient. "The mere fact that a decedent, a pedestrian, was struck by a vehicle on a public highway was not sufficient to support a finding of negligence": Sajatovich v. Traction Bus Co., 314 Pa. 569, 572.' Applying these decisions to the present case, the conclusion is inescapable that under appellant's evidence there was no question of negligence on the part of appellee to be presented to the jury, and hence the motion to take off the compulsory nonsuit was properly refused."

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Similarly, in the case at bar, since the record is devoid of any evidence showing how plaintiff's intestate came on to the highway or what length of time he was on the highway before he was struck and his movements on the highway until the moment of impact are left wholly unexplained, "it is impossible to infer from the evidence presented that [defendant] saw or should have seen him on the highway a sufficient time before the accident to bring the automobile to a stop * * *. Under such circumstances and in the absence of any evidence that [said defendant] was driving in an improper manner or at an excessive rate of speed, that his attention was distracted, or that his car was mechanically defective, a verdict in favor of (plaintiff) would necessarily be based upon pure speculation and conjecture, rather than upon any proof of negligence, and could not be sustained."

The plaintiff argues, nonetheless, that the jury could have and did disbelieve the defendant driver's claim that he was observing the roadway ahead.

However, even if the jury could have found "from the evidence that the defendant driver was at fault in failing to observe the plaintiff's intestate, the same evidence renders more manifest decedent's default in failing to see the defendants' approaching vehicle." Auel v. White, 389 Pa. 209, 132 A.2d 350 (1957).

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In the Auel case, supra, the facts were strikingly similar to those in the case at bar. There at about 9PM the plaintiff, about 60 years of age, was walking across a four lane 45 foot in width thoroughfare in Allegheny County. After the plaintiff traversed the roadway on the south side of the street and crossed the center line thereof he was struck by the defendants car at a point between the left front bumper and fender and by reason of the injuries inflicted was rendered mentally incompetent. The defendant "stated that 'I didn't see that man until I hit him'."

Moreover, in that case since the plaintiff was incompetent the Court accorded him the same presumption as would have been accorded a decedent and nonetheless held that he was guilty of contributory negligence as a matter of law. If anything, the case at bar presents an a fortiori situation in that the plaintiff here was clearly shown to have been heavily intoxicated and to have been a pedestrian on a limited access highway in the middle of the night where he had no right to be.

In holding the plaintiff guilty of contributory negligence as a matter of law the Pennsylvania Supreme Court said in Auel, (389 Pa. at pp. 213-214):

"However, even if the jury could find from the evidence that the defendant was at fault in failing to observe the plaintiff the same evidence renders more manifest plaintiff's default in failing to see the defendant's approaching vehicle. It is well established that where a pedestrian traverses a street at other than a regular crossing he is bound to exercise a higher degree of care for his own safety than would be the case were he crossing at an intersection: Harris v. DeFelice, 379 Pa. 469, 475, 109 A.2d 174; Rucheski v. Wisswesser et al., 355 Pa. 400, 50 A.2d 291. The reason for the rule is apparent for he is crossing at a place where vehicular traffic could not be expected to anticipate a pedestrian: Schweitzer et al. v. Seranton Bus Company, 344 Pa. 249, 25 A.2d 156. It is equally well settled that it is the duty of a pedestrian to look before he undertakes a street crossing and to continue to look as he proceeds and such duty is particularly incumbent upon one who traverses a street between intersections: Aaron v. Strausser, 360 Pa. 92, 59 A.2d 910. Since the plaintiff herein was unable, due to his failure of memory, to give his version of the accident, the same presumption of due care which arises upon the death of a party was applicable. Where a plaintiff's mind is a blank as to an accident and all its incidents, the presumption is that he did all that the law required him to do and was not guilty of contributory negligence: Heaps et al v. Southern Pennsylvania Traction Co., 276 Pa. 551, 553, 120 A. 548; Grgona v. Rushton, 174 Pa. Superior Ct. 417, 101 A.2d 768. The presumption, however, is a rebuttable one and must give way when the facts as established by plaintiff's evidence show that he was guilty of contributory negligence: Hogg, Admr. v. Bessemer & Lake Erie Railroad Company, 373 Pa. 632, 638, 96 A.2d 879; Rank v. Metropolitan Edison Company, 370 Pa. 107, 115, 87 A.2d 198. * * *

* * *

"* * * There was nothing to show that plaintiff's view was in any way obscured, and, therefore, he was bound to see that which must have been plainly visible at the time it became his duty to look. The inference is unavoidable that if plaintiff had looked he could have averted the danger. No other reasonable conclusion can be drawn from the testimony presented in plaintiff's case. If he failed to look he was negligent and if

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> he looked he must have seen defendant's moving vehicle and in stepping in front of it or into it was equally negligent. What was said in Dando v. Brobst, 318 Pa. 325, 327, 177 A. 831, is apposite here: '. . . plaintiff must inevitably have seen the car if she had looked, and if she saw nothing she could not have been looking. As we have repeatedly pointed out, it is vain for a person to say he looked when, in spite of what his eyes must have told him, he moved into the path of an approaching car or train by which he was immediately struck.'. See also Weldon, Admrs. v. Pittsburgh Railways Company et al., 352 Pa. 103, 105, 41 A.2d 856 * * *"

The rule in Pennsylvania was otherwise summarized by the Pennsylvania Supreme Court in Dwyer v. Kellerman as follows: (363 Pa. at pp. 595, 596):

> "'It is settled that a pedestrian crossing a street must not only look before he enters but must continue to look as he proceeds and that he will not be heard to say that he looked without seeing what was approaching and plainly visible: [citing cases] (Emphasis supplied). See also Rucheski v. Wisswesser, 355 Pa. 400, 401, 50 A.2d 291; and Pessolano v. Philadelphia Transportation Co., 349 Pa. 73, 75, 36 A.2d 497' * * * 'A pedestrian intending to traverse a street has a duty to maintain a diligent lookout for approaching cars. If he fails to do so, he is guilty of contributory negligence as a matter of law: Gajewski v. Lightner, 341 Pa. 514, 516, 19 A.2d 355, 356'".

In addition to plaintiff's intestate's manifest failure to look, defendants claim further negligence on his part is shown by his mere presence on the limited access highway in violation of 36 P.S. § 2391.1 which provides that:

> "For the purposes of this act, a limited access highway is defined as a public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway * * *"

and by his highly intoxicated (if not comatose) condition (75 P.S. Sec. 624.1).

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Defendants' position in short is that, if a person is found at 11:15 PM in an almost comatose condition in the middle of a limited access highway and is unable to avoid a collision with a small Volkswagen he must be guilty of contributory negligence as a matter of law.

As indicated above, the Pennsylvania authorities support this conclusion. Auel v. White, 389 Pa. 209, 132 A.2d 350 (1957); Martin v. Marateck, 345 Pa. 103 (1942); Dwyer v. Kellerman, 363 Pa. 593 (1950).

Quite apart from the applicable law in Pennsylvania it is difficult to conceive of how plaintiff's intestate came into contact with defendants' Volkswagen without doing so intentionally or being so wantonly and grossly negligent and reckless in the premises as to produce such result. To put it mildly, it would have been a simple matter for anyone in even partial possession of his faculties to have avoided colliding with a Volkswagen travelling at 55 mph.

It is not inconceivable that a driver of an automobile on a limited access, high-speed highway with no illumination other than his own headlights might not observe a person coming from an unknown and unspecified place on the left hand side of the vehicle, but it is utterly incredible that the plaintiff's intestate failed to see the headlights of the approaching Volkswagen which was the only vehicle

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on the entire highway. As the Supreme Court in Pennsylvania said in the case of Sweigert v. Mazer, 410 Pa. 71 at p. 77 (1963):

> "' His failure to observe appellee's motor vehicle not only is unexplained but inexplicable.'"

If the courts are to hold that a person may get himself (i) into a highly intoxicated condition (ii) into the middle of a limited access, high-speed highway in the middle of the night and (iii) into contact with the only vehicle proceeding on such highway (travelling within the speed limit and with its headlights lit) and that under the circumstances a jury may determine that there was no contributory negligence, then the doctrine of contributory negligence becomes either a sham or an illusion.

For the foregoing reasons the Court feels that the verdict must be set aside and a judgment for the defendants must be entered notwithstanding the verdict under and pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

Pursuant to Rule 50(c) of such Rules, the Court must also rule on the defendants' motion for a new trial by determining whether it should be granted if the judgment for the defendants is hereafter vacated or reversed and must specify the grounds for granting or denying defendants' motion for a new trial.

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As indicated above, the Court feels that the verdict as rendered was contrary to the weight of the credible evidence and, in addition, it also feels that the verdict was so grossly excessive as to indicate a lack of proper deliberation on the part of the jury.

Plaintiff's first claim was for alleged conscious pain and suffering of his son prior to his death and the jury returned a verdict of $10,000 on this claim. Plaintiff's theory on this claim was that the coroner's report indicated one of the causes of death to be - "bleeding to death" - and that from this entry the jury could infer that plaintiff's intestate suffered "conscious pain and suffering". Again, it defies credibility that a man with .39% blood alcohol content could (i) have been conscious after the indicated accident or (ii) have felt any pain during the very short period of time before he was pronounced dead on the arrival of the appropriate authorities. In addition, all of this presupposes that the decedent was not killed instantly and had some period of inebriated consciousness.

Again, the commonly used expression "he is feeling no pain" would have little or no meaning if this portion of the verdict were to be upheld. Common sense dictates that there is just no basis for this portion of the jury's verdict and it is even questionable in the Court's mind whether an inference of "conscious" pain and suffering may properly be

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drawn from the foregoing entry in the coroner's report. There was no medical testimony to such effect.

With respect to the plaintiff's second claim, the parties stipulated during the course of the trial that the maximum amount of the allowable funeral expenses was $2,411.31 and left to the jury solely the question of the reasonableness thereof. Despite such stipulated maximum, the jury returned a verdict for $2500 for funeral expenses.

The award of $67,500 for wrongful death is also incredible in the light of the evidence. The plaintiff admitted that he had testified at the first trial that his son made contributions of $100 to $200 amonth for the use of various relatives of the decedent other than his mother and father. Answers to interrogatories served prior to the trial made no claim of support for Mr. and Mrs. Mehra. During the course of the second trial the plaintiff claimed apparently for the first time that some of the money (the $100 to $200 a month) had been used for his purposes and had not all been passed on to other relatives.

While the decedent gave every indication of some potential in his career and there was unquestioned evidence that he was devoted to his family, the proof also showed that he had not been working from September of 1971 until shortly before his death in April, 1972 and that in his new job of about one month he was only making $15,000 a year.

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There was no proof that any of his first month's salary went to his parents. There was proof that his father, the plaintiff, was working and supporting his wife. Even if it were assumed that the decedent would have made some contributions (possibly as much as $100 to $200 a month) to his parents for the balance of their lives, the verdict was far in excess of any such amounts discounted to today's value. There must be some rational basis to sustain this or any other verdict of a jury. In this case, none exists. An outside maximum of approximately one-half of the jury's verdict might have been justifiable on the evidence, but beyond that the verdict represents "guesswork" and should not be sustained.

The Court is well aware of substantial verdicts being allowed to stand in cases such as Hart v. Forchelli, 445 F.2d 1018 (2d Cir.), cert. denied, 404 U.S. 940 (1971), and Campbell v. Westmoreland Farm, Inc., F.Supp. (E.D. N.Y., 1972, Judd, J.) 67-C-1, but does not believe that verdicts based on sheer speculation such as the one in the case at bar have any place in the true administration of justice.

For the foregoing reasons if this Court's judgment notwithstanding the verdict is vacated or reversed, a new trial should be had.

SO ORDERED.

/s/ Thomas C. Platt

U.S.D.J.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROSHAN L. MEHRA, etc.,

Plaintiff-Appellant,

- *against* -

ROBERTA BENTZ et ano.,

Defendants-Appellees,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 14th *day of* August *19* 75 *at* 415 Madison Ave, N.Y., N.Y.

deponent served the annexed Appendix *upon*
BOWER & GARDNER

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 14th
day of August *19* 75

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977